UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/905,387	07/13/2001	Elvin Lukenbach	JBP-555	6099

27777 7590 09/09/2003

AUDLEY A. CIAMPORCERO JR.
JOHNSON & JOHNSON
ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, NJ 08933-7003

EXAMINER
YU, GINA C

ART UNIT	PAPER NUMBER
1617	

DATE MAILED: 09/09/2003 12

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application N .	Applicant(s)	
	09/905,387	LUKENBACH ET AL.	
	Examiner	Art Unit	
	Gina C. Yu	1617	

-- The MAILING DATE of this communicati n appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *13 June 2003* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-38* is/are pending in the application.

4a) Of the above claim(s) *34-38* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-35* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) *8* .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Election/Restrictions

Applicant's election of group I in Paper No. 7 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Species election requirement is withdrawn in view of further consideration.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

1. Claims 1-14, 17, 18, 21-29, 31-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chausse (US 5334325) in view of Wivell et al. (US 5599549) ("Wivell").

Chausse teaches a delayed-gelling, post-foaming composition comprising an anionic phosphate surfactant. See abstract. The reference teaches using a two-compartment type aerosol container. See col. 6, lines 34 – 46. See instant claims 1, 18, 21, 22. The reference teaches using a blend of isobutene and pentane to produce delayed foaming and the effect of pH on gel firmness. See col. 7, line 5 – col. 10, line

21. The reference also teaches the two-compartment type aerosol container. See col. 6, lines 36 – 46. See instant claims 30-33.

Chausse fails to teach liquid crystal structure in the composition.

Wivell teaches that a personal cleansing composition comprising 1-10 % by weight of an anionic surfactant, and a nonionic surfactant or an amphoteric surfactant. The reference teaches that the composition can be in the form of foaming gel, and that the compositions can be delivered as foam by formulating an aerosol system with propellants such as butane or propane. See col. 7, line 50 – col. 8, line 30. The reference also teaches that the dispersion of oil in the composition can be in the form of liquid crystal. See col. 4, lines 31 – 43. The reference teaches sodium laureth-3 sulfate as the most preferred anionic surfactant. See col. 3, lines 35 – 59; instant claims 7, 8. Cocamidopropyl betaine is also taught as a preferred amphoteric surfactant. See col. 4, lines 1 – 30, Example 1; instant claims 10-12. The reference further teaches to adjust the pH to 6-7. See col. 12, lines 10-17; instant claims 23 and 24. The reference teaches that nonionic surfactants such as ethoxylated glyceryl esters can be used. See col. 4, lines 20-21; instant claims 13 and 14. The reference generally teaches that 0.1-70% of a co-surfactant can be used in addition to the anionic surfactant. See col. 4, lines 1 – 8. The conditioning oils such as 12-15 carbon containing alcohol benzoates, isopropyl palmitate, natural or synthetic triglycerides are also taught. See col. 5, lines 16 – 42. Glycerol is also the most preferred humectant. See col. 6, lines 50-53; instant claim 29. The reference also suggests using cationic polymers such as guar hydroxypropyltrimonium chloride. See col. 7, lines 4 – 14; instant claims 26-27.

Requiring the viscosity prior to the mixing step in claim 2 is viewed as process steps which will not be given patentable weight. It is well settled in patent law that, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." See In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted). Nevertheless, examiner notes that the reference teaches that the viscosity of the foam composition is in the range of 0.1-40 cPs. See col. 8, lines 31 – 39. While the reference fails to teach the viscosity of the surfactant mixture, examiner notes that the recited viscosity reads on any viscosity ranging from zero to 95499 cps. Given the teaching of the low viscosity of the final foaming composition in the reference, the viscosity of the Wivell surfactant mixture is viewed within the recited range of the viscosity.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the composition of Chausse by adding the dispersing phase of the conditioning oil phase as motivated by Wivell because of an expectation of successfully producing a foaming cosmetic with liquid crystal structure.

2. Claims 15, 16, and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chausse (US 5334325) and Wivell et al. (US 5599549) ("Wivell") as

applied to claims 1-14, 17, 18, 21-29, and 31-33 as above, and further in view of Lorant (US 6333362 B1).

Chausse and Wivell fail to teach decyl glucose.

Lorant teaches that alkylglucosides such as decyl glucoside is a well known nonionic foaming surfactant. See col. 6, lines 55 – 58; example 3.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the composition of the combined references by substituting the nonionic surfactants with alkylglucosides such as decyl glucose as motivated by Lorant because of an expectation of successfully producing a foaming composition with similar effects.

3. Claims 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chausse, Wivell, and Lorant as applied to claims 1-18, and 21-33 as above, and further in view of Szymczak (US 5858343).

Chausse, Wivell, and Lorant fail to teach the ratio of isobutene and isopentane.

Szymczak teaches post-foaming cosmetic cream composition. The reference teaches that isobutene and isopentane mixture is the most preferred post-foaming agent, and that weight ratio of the isobutene and isopentane is preferably 1:3. See col. 6, lines 29-36.

It would have obvious to one of ordinary skill in the art at the time the invention was made to have modified the weight ratio of isobutene and isopentane as motivated by Szymczak because of an expectation of successfully producing a foaming cosmetic gel composition.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 703-308-3951.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 703-305-1877. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1234.

Gina C. Yu
Patent Examiner

SREENI PADMANABHAN
PRIMARY EXAMINER

9/8/03